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IN THE

Supreme Court of the United States

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CEDRIC D. SIMMS,

Petitioner,

v.

STATE OF OKLAHOMA, EX REL.,
THE DEPARTMENT OF MENTAL HEALTH AND
SUBSTANCE ABUSE SERVICES, A STATE AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an amendment to an EEOC charge of discrimination relate back to the date of the original charge for the purpose of complying with the statute of limitations for Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, where the amendment alleges an additional "legal theory" that grows out of the same set of operative facts that were in the original charge?

PARTIES

All of the parties are listed in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN NUMEROUS OTHER CIRCUITS 9

II. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE 15

III. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT 22

A. Avoiding the Imposition of Technical Requirements upon Lay Persons 22

B. Deference to Agency Interpretations 24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases: *Pages:*

Adames v. Mitsubishi Bank, Ltd., 751 F. Supp. 1565 (E.D.N.Y. 1990) 10-12, 14

Ahmed v. Samson Management Corp., 1996 WL 183011 (S.D.N.Y. 1996) 11

Alpern v. Utilicorp United, Inc., 84 F.3d 1525 (8th Cir. 1996) 18

Anderson v. Block, 807 F.2d 145 (8th Cir. 1986) 12

B. Sanfield, Inc. v. Finaly Fine Jewelry Corp., 168 F.3d 967 (7th Cir. 1999) 19

Bridges v. Eastman Kodak Co., 822 F. Supp. 1020 (S.D.N.Y. 1993) 20

Bularz v. Prudential Ins. Co. of Am., 93 F.3d 372 (7th Cir. 1996) 18

Caribbean Broad. System, Ltd., v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) 19

Cheek v. Western and Southern Life Ins. Co., 31 F.3d 497 (7th Cir. 1994) 20

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 24, 25

City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, __, 139 L. Ed. 2d 525 (1997) 18

Conroy v. Boston Edison Co., 758 F. Supp. 54 (D. Mass. 1991) 12-14, 20, 21

Pages:

Drummer v. DCI Contracting Corp., 772 F. Supp. 821 (S.D.N.Y. 1991) 14

Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, 657 F.2d 890 (7th Cir. 1981) 16

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996) 10, 11

Federal Deposit Ins. Corp. v. Bennett, 898 F.2d 477 (5th Cir. 1990) 18

Fellows v. Universal Restaurant, 701 F.2d 447 (5th Cir. 1983) 23, 24

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) . . 25

Goren v. New Vision Int'l, Inc., 156 F.3d 721 (7th Cir. 1998) 19

Hicks v. ABT Associates, 572 F.2d 960 (3d Cir. 1978) . 11

Hopkins v. Digital Equip. Corp., 1998 WL 702339 (S.D.N.Y. 1998) 10, 11

Hornsby v. Conoco Inc., 777 F.2d 243 (5th Cir. 1985) 12, 13

Kahn v. Pepsi Cola Bottling Group, 526 F. Supp. 1268 (E.D.N.Y. 1981) 11

Lantz v. Hospital of the Univ. of Penn., 1996 WL 442795 (E.D. Pa. 1996) 10, 11

Love v. Pullman, 404 U.S. 522 (1972) 16, 22, 23

Pages:

McKenzie v. Illinois Dep't of Transp., 92 F.3d 473 (7th Cir. 1996) 20

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 23

Morton v. Ruiz, 415 U.S. 199 (1974) 25

Oates v. Discovery Zone, 116 F.3d 1161 (7th Cir. 1997) 19

Paige v. California, 102 F.3d 1035 (9th Cir. 1996) . 23, 24

Pejic v. Hughes Helicopters, Inc., 840 F.2d 667 (9th Cir. 1988) 10, 11

Pena v. United States, 157 F.3d 984 (5th Cir. 1998) . . . 18

Rizzo v. WGN Continental Broad., Co., 601 F. Supp. 132 (N.D. Ill. 1985) 14

Robinson v. H. Dalton, 107 F.3d 1018 (3rd Cir. 1997) . 20

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 12, 13, 15, 20

Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124 (7th Cir. 1989) 16, 24

Seymore v. Shawver & Sons, Inc., 111 F.3d 794 (10th Cir. 1997), *cert. denied* 118 S. Ct. 342 (1997) 16

St. Francis College v. Al-Kharzaji, 481 U.S. 604 (1987) 11

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) . . 19

Pages:

Warren v. Halstead Indus., 1983 WL 544 (M.D.N.C. 1983) 14

Washington v. Jenny Craig Weight Loss Centres, 3 F. Supp.2d 941 (N.D.Ill. 1998) 20, 21

Washington v. Kroger Co., 671 F.2d 1072 (8th Cir. 1982) 12, 13

Worthington v. Wilson, 8 F.3d 1253 (7th Cir. 1993) . . . 18

Zanders v. O'Gara-Hess, 952 F.2d 404 (6th Cir. 1992) 1992 U.S. App. Lexis 535 11

Zipes v. Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants, 455 U.S. 385 (1982) 16, 22, 23

Statutes, Rules, and Regulations:

28 U.S.C. §1254 2

29 C.F.R. §1601.12 . . . . . *passim*

29 C.F.R. §1601.28 6

29 C.F.R. §1601.34 16

29 C.F.R. §1602.14 17

42 U.S.C. §2000e-12(a) 2, 25

42 U.S.C. §§2000e-5 2

FED. R. CIV. P. 8 19

FED. R. CIV. P. 15 18

Pages:

FED. R. CIV. P. 23 23

Title VII of the Civil Rights Act of 1964 ..... *passim*

Other Authorities:

5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1215 (1990) 19

No. 98-

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OCTOBER TERM, 1998

CEDRIC D. SIMMS,

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V.

STATE OF OKLAHOMA, EX REL.,THE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES, A STATE AGENCY

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cedric D. Simms respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on January 25, 1999.

OPINIONS BELOW

The opinion of the Tenth Circuit, which is reported at 165 F.3d 1321 (10th Cir. 1999), is set out at pp. 1a-16a of the Appendix hereto. The September 3, 1997, opinion of the district court granting the respondent's motion for summary judgment, which is not reported, is set out at pp. 17a-24a of the Appendix. The decision of the court of

appeals denying rehearing and rehearing en banc, which is not reported, is set out at p. 25a of the Appendix.

JURISDICTION

The decision of the Tenth Circuit was entered on January 25, 1999. A timely petition for rehearing was denied on February 24, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTES AND REGULATIONS INVOLVED

This matter involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and its implementing regulation, 29 C.F.R. §1601.12(b), which provides, in pertinent part:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

The pertinent portions of Title VII, specifically 42 U.S.C. §§ 2000e-5 and 2000e-12(a), are printed at pp. 26a-28a of the Appendix.

STATEMENT OF THE CASE[1]

Petitioner, Cedric Simms, began his employment with the respondent at Griffin Memorial Hospital in Norman, Oklahoma as a Fire and Safety Officer I on April 29, 1991. (App. 2a). On September 11, 1991, the respondent posted a job announcement for the position of Fire and Safety Officer II. *Id.* Mr. Simms was qualified for the position and applied, but the defendant gave it to a white employee less qualified than Mr. Simms. As a result, on October 12, 1992, Mr. Simms filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that the respondent denied Mr. Simms the promotion because of his race, black. *Id.* The EEOC issued a right-to-sue letter. On December 21, 1993, Mr. Simms filed an action in federal court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* ("Title VII"). *Id.*

On April 13, 1994, the parties to that case reached a settlement. Pursuant to the settlement agreement, the respondent promoted Mr. Simms to the position of Fire and Safety Officer II, effective May 1, 1994. *Id.* Also, in the settlement agreement the respondent agreed not to subject Mr. Simms to the customary six (6) month probationary period. *Id.* Respondent's employees Carol Kellison, Director of Management Support Services, and Stand LaBoon, Superintendent, were provided with a copy of the agreement and were aware that the agreement required the probationary period be waived. Nevertheless, Kellison and LaBoon withheld Mr. Simms' supervisory duties until June 20, 1994. *Id.*

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[1]Although this case has its origins in a complicated history of litigation, this petition includes only those facts that are relevant to the issue before the court.

On June 30, 1994, ten days after Mr. Simms began his supervisory duties, the respondent posted a job announcement for the position of Fire and Safety Officer Supervisor. *Id.* The job announcement stated that "PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE." *Id.* Mr. Simms applied, interviewed for the position, and received the highest scores from a panel of six interviewers. Instead of promoting Mr. Simms, Kellison initiated a second round of interviews and selected the three member panel, which consisted of Kellison, La Boon, and Ed Smith, an African American. The respondent ultimately gave the position to Bruce Valley, a white employee. At the time that Mr. Valley was promoted he was being supervised by Mr. Simms. *Id.* Nevertheless, respondent contended that Mr. Valley was given the promotion because he had more supervisory experience than Mr. Simms.

Unassisted by counsel, Mr. Simms filed a second EEOC charge on October 31, 1994. (App. 2a). Mr. Simms checked the box indicating he believed that he was discriminated against because of his race. (The charge is reproduced in the Appendix following App. 29a). In the area asking for the particulars of his claim, Mr. Simms stated that his claims arose from the denial of his promotion to the position of Fire and Safety Officer Supervisor.[2]

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[2]Specifically, the charge stated:

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the

On July 15, 1996, Mr. Simms, now having obtained the assistance of counsel, filed an amendment to his October 31, 1994 EEOC charge. (App. 3a). Mr. Simms added retaliation as a legal claim and explained why he believed respondent's decision not to promote him was motivated by racial discrimination and retaliation for his previous lawsuit. (See following App. 31a). He also alleged additional acts related to the promotion denial he believed were unlawful employment practices.[3]

Civil Rights Act of 1964, as amended.

[3]Specifically, the amendment stated:

> I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held [*sic*] from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.
>
> II. The reasons given for withholding of supervisory duties and other disciplinary action, I believe were pretextural [*sic*]. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.
>
> III. I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> This charge has been amended to include retaliation, and the continuing violation.

The EEOC accepted Mr. Simms' amendment. The EEOC completed its investigation of the October 31, 1994 charge and, on September 25, 1996, issued a letter of determination stating that it found "reasonable cause to believe the charge is true." (App. 4a). Attempts at conciliating both Mr. Simms' retaliation and race discrimination claims failed. On October 2, 1996, the United States Department of Justice[4] issued a right-to-sue letter. *Id.* On December 31, 1996, the petitioner brought the present action alleging that the respondent discriminated against him on the basis of race and retaliation in violation of Title VII. *Id.*

On June 16, 1997, the respondent filed a motion for partial summary judgment, claiming that Mr. Simms' retaliation claims asserted in the amendment to the second charge did not relate back to the date of its filing, October 31, 1994, and were therefore time-barred. (App. 17a). The district court granted the motion on September 3, 1997, holding that Mr. Simms failed to exhaust his administrative remedies. The court found that the allegations in the amendment to the second EEOC charge related to events that occurred more than 300 days prior to the amendment and were not properly part of the charge, even though the events occurred within 300 days of October 31, 1994, and were based on the allegations in the charge that was timely filed on that date. (App. 24a). On September 11, 1997, the respondent filed a summary judgment motion with respect to Mr. Simms' remaining claims and that motion was granted on October 23, 1997. (App. 4a).

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[4]Although Mr. Simms' charge of discrimination was filed with the EEOC, where the respondent is a government or governmental agency, the Attorney General of the United States issues the notice of right to sue "[w]hen there has been a finding of reasonable cause by the [EEOC], there has been a failure of conciliation, and the Attorney General has decided not to file a civil action." 29 C.F.R. §1601.28(d)(1).

The petitioner filed a timely appeal to the United States Court of Appeals for the Tenth Circuit. Mr. Simms argued, *inter alia*, that the amendment to the charge complies with 29 C.F.R. §1601.12(b), allowing amendments to relate back to the date of the original charge, because it added "additional acts which constitute unlawful employment practices related to or growing out of" the same subject matter as the original charge: the promotion denial.

The court below affirmed the judgment of the district court, holding that Mr. Simms failed to exhaust his administrative remedies with regard to his retaliation claims:

> . . . [W]e hold that Mr. Simms' retaliation charge does not relate back under §1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge.

(App. 8a).

Even though the EEOC had investigated the retaliation charge and attempted conciliation between Mr. Simms and the respondent, the court stated that

> [p]rohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period -- giving the employer notice and providing opportunity for administrative investigation and conciliation.

(App. 8a).

On February 4, 1999, Mr. Simms filed a timely petition for rehearing. The petition for rehearing was denied on February 24, 1999.

REASONS FOR GRANTING THE WRIT

The petitioner in this case alleges that he was subjected to racial discrimination and a series of retaliatory acts. Despite a finding by the EEOC of probable cause to believe that the petitioner was discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, petitioner was prevented from presenting his retaliation claims to a jury because the courts below misconstrued the applicable EEOC regulation. That regulation, 29 C.F.R. §1601.12(b), set out *supra* at pp. 1-2, provides that amendments to timely filed charges that

> allege[] additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the [original] charge was first received.

29 C.F.R. §1601.12(b). The rulings below unnecessarily penalize lay persons who fail to attach the correct legal labels to the factual allegations in their EEOC charges. It adopts a hyper-technical reading of the phrase "related to or growing out of" which makes the legal "theory of recovery," not facts that would be known to a layperson, the determining criterion of timeliness, notwithstanding that the employer is put on notice by the original charge of the specific adverse employment action -- here the August, 1994 failure to promote Mr. Simms to Fire and Safety Officer Supervisor -- alleged to have been unlawful.

The petition for a writ of certiorari should be granted because the decision below directly and irreconcilably conflicts with the rulings of several other Circuits, as well as applicable decisions of this Court. Further, the decision resolves an important federal question in way that disrupts settled doctrine and undermines Congress' intent that Title VII provide accessible and effective remedies to eradicate

employment discrimination.

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN NUMEROUS OTHER CIRCUITS

This case concerns the Tenth Circuit's interpretation of 29 C.F.R. §1601.12(b), the EEOC regulation controlling the relation back of amendments to an EEOC charge. Substantially differing standards for applying §1601.12(b) are in use in the federal courts. Whether a claimant will receive a trial on the merits, or have his claims dismissed for failure to exhaust his administrative remedies, frequently turns solely on the district court and Circuit in which his complaint is filed. This case presents an opportunity to provide lower courts with a single, clear standard for resolving this critical issue.

EEOC regulations explicitly allow the amendment of charges of discrimination. Under the regulations, an amendment filed outside of the applicable limitations period will be considered timely if it is intended to "cure . . . omissions . . . or to clarify and amplify allegations made therein" or "alleg[es] additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." 29 C.F.R. §1601.12(b). This language makes clear that an amendment can allege new legal claims so long as those claims arose out of the same set of operative facts as were alleged in the original charge.

The court below took an exceedingly narrow view of the regulation. The Tenth Circuit's decision would allow amendments to relate back only if those amendments clarify legal theories already articulated in the original charge. (App. 8a). The result is a blanket rule prohibiting amendments alleging new legal claims even when those

claims are "related to or grow[ ] out of the subject matter of the original charge." (App. 6a). This position is untenable because nothing in the statute or regulation proscribes an amendment that includes a new legal claim.

The court below correctly observed that its opinion conflicts with those of numerous other Courts of Appeals. (App. 7a-8a). Although the Courts of Appeals have taken two general approaches to the issue, as set out below, there are several distinct standards used in the lower courts.

The Fourth and Ninth Circuits have taken an approach similar to that of the Tenth Circuit and have concluded that an amendment will not relate back if it advances a new theory of recovery, regardless of what facts were included in the original charge. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988). In addition, although the Second and Third Circuits have not directly addressed this question, two district courts in those Circuits have followed the standard adopted by the Fourth, Ninth and Tenth Circuits. *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, *2 (S.D.N.Y. 1998);[5] *Lantz v. Hospital of the Univ. of Penn.*, 1996 WL 442795, *4 (E.D. Pa. 1996).

The opinion in *Evans* demonstrates the consensus approach of the Circuits that adopt this narrow construction of the EEOC regulation. In *Evans,* the court refused to permit relation back of an amendment adding age discrimination to the original charge of sex discrimination, even though both legal claims arose out of the same facts

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[5]As with the Circuits, there is a split among the district courts in the Second Circuit. *Compare Hopkins v. Digital Equip. Corp*, 1998 WL 702339, 2 (S.D.N.Y. 1998), *with Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1565, 1572-73 (E.D.N.Y. 1990).

and circumstances described in the original charge. *Evans*, 80 F.3d at 963. The court interpreted "related to or growing out of" to mean that a new legal claim must "flow from" the old *legal claim*, not from the underlying operative facts. *Id.* Applying this standard, the court concluded that "age discrimination does not necessarily flow from sex discrimination and vice versa." *Id.* The court, however, provided no guidance in determining when one legal claim "flows" from the other.[6]

On the other hand, the Third, Fifth, Sixth and Eighth Circuits have taken a more flexible approach to the regulation and have held that the language of the regulation encompasses claims based on different legal theories that derive from the same set of operative facts included in the original charge. *See Hicks v. ABT Associates*, 572 F.2d 960, 965 (3d Cir. 1978) (where claim of sex discrimination arose out of the same facts as the claim of race discrimination set out on EEOC charge, relation back is permissible if the two claims are "directly related"); *Zanders v. O'Gara-Hess*, 952 F.2d 404 (6th Cir. 1992), 1992 U.S. App. Lexis 535 (termination following suspension that was subject of

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[6]Under this approach, few amendments have been regarded as relating back to the original charge unless they involve the overlapping statutorily protected categories of race, color, and national origin. *See, e.g., Kahn v. Pepsi Cola Bottling Group*, 526 F. Supp. 1268, 1270 (E.D.N.Y. 1981)(national origin and race); *Adames v. Mitsubishi Bank*, 751 F. Supp. 1572 (race, color, national origin connected); *cf. St. Francis College v. Al-Kharzaji*, 481 U.S. 604, 614 (1987)(Brennan, J. concurring) (ethnicity and national origin overlap as a legal matter under Title VII); *Ahmed v. Samson Management Corp.*, 1996 WL 183011, *6 (S.D.N.Y. 1996) (noting that in Title VII context, national origin claims may be treated as ancestry or ethnicity claims). *Compare, e.g., Evans*, 80 F.3d 954 (sex and age not sufficiently related); *Pejic*, 840 F.2d 667 (national origin and age not sufficiently related); *Hopkins*, 1998 WL 702339 (race, disability and retaliation not sufficiently related); *Lantz*, 1996 WL 442795 (disability and age not sufficiently related).

charge); *Anderson v. Block*, 807 F.2d 145, 149 (8th Cir. 1986) (same); *Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985) ("other" box checked, age and retaliation written in, but references to sex in factual statement held sufficient to constitute charge on that basis); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-1076 (8th Cir. 1982) (second charge properly treated as amendment of first); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1970) (national origin amendment to original charge on which "sex" box was checked)[7]. In addition, although the First and Second Circuits have not addressed the question directly, two district courts in those Circuits have also adopted a similar approach. *Conroy v. Boston Edison Co.*, 758 F. Supp. 54, 58 (D. Mass. 1991); *Adames v. Mitsubishi Bank, Ltd.*, 751 F. Supp. 1565, 1573 (E.D.N.Y. 1990).

Underlying the opinion in *Sanchez* and its progeny is the recognition that "a large number of the charges filed with [the] EEOC are filed by ordinary people unschooled in the technicalities of the law." *Sanchez*, 431 F.2d at 463 (internal citations omitted); *accord Washington*, 671 F.2d at 1076; *Conroy*, 758 F. Supp. at 60; *Adames*, 751 F. Supp. at 1572. Therefore, these courts hold, procedural rules governing Title VII must be sufficiently liberal to protect their rights. Moreover,

> the crucial element of a charge of discrimination is the factual statement contained therein. . . The selection of the type of discrimination alleged, i.e., the selection of which box to check, is in reality nothing more than the attachment of a legal

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[7]Although the Fifth Circuit allows the amendment as a "technical amendment" it is evident from the opinion that the additional allegations and inclusion of a new legal theory were substantive and of the same nature as in the other decisions cited. *Sanchez*, 431 F.2d at 458-59.

> conclusion to the facts alleged. In the context of a statute like Title VII it is inconceivable that a charging party's rights should be cut off merely because he fails to articulate correctly the legal conclusion emanating from his factual allegations.

Sanchez, 431 F.2d at 462.

Despite these commonalities, each of these Circuits have taken slightly different routes to reach the conclusion that claims related to the operative facts of the original charge are not time-barred. In *Hornsby v. Conoco, Inc.*, the Fifth Circuit followed the teachings of *Sanchez*, and applied the bright line rule of allowing amendments containing new legal theories to relate back where those theories are based on facts in the original charge. *Hornsby*, 777 F.2d at 247; *Sanchez*, 431 F.2d at 462.

Another group of courts have utilized a "scope of the investigation" and "like or reasonably related" analysis to determine whether claims are time-barred.[8] In *Washington v. Kroger*, the court began its inquiry by focusing on the factual statement in the original charge to determine whether it supported the new legal theory alleged in the amendment. 671 F.2d at 1076. Next, the court looked

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[8]The "scope of the investigation" and the "like or reasonably related" doctrines are inquiries distinct from the question whether amendments relate back to the date of the original charge, although the result is the same. These two doctrines

> revolve[] around the principle that the scope of a civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy, 758 F. Supp. at 58.

beyond the words of the charge to discern whether, "[h]ad the EEOC "investigated plaintiff's first charge, it is reasonable to suppose that it would have uncovered the related incidents that underlay the [amendment]." *Id.* This hybrid approach has also been followed by several district courts. *See, e.g. Rizzo v. WGN Continental Broad., Co.*, 601 F. Supp. 132, 134 (N.D. Ill. 1985) (although the court focused on the underlying facts and not legal conclusions, the court used "like or reasonably related" and "scope of investigation" standards to determine relation back of amendment); *Adames*, 751 F. Supp. at 1573 (same); *Drummer v. DCI Contracting Corp.*, 772 F. Supp. 821, 826 (S.D.N.Y. 1991) (applies "like or related to" standard); *Warren v. Halstead Indus.*, 1983 WL 544, *4 (M.D.N.C. 1983) (erroneously stating that scope of investigation test is codified in 29 C.F.R. §1601.12(b)).

A district court in the First Circuit applied yet another approach. In *Conroy v. Boston Edison Co.*, while stating that "[a]n amendment is said to grow out of the same subject matter as the initial charge where the protected categories are related . . . ." 758 F. Supp. at 58, the court went beyond this approach to hold that: "[e]ven where the amendment alleges a new protected category . . . it will still relate back where the predicate facts underlying each claim are the same." *Id.*

The circumstances of this case crystallize the practical consequences of those differing standards. The petitioner's retaliation amendment was held to be time-barred by the Tenth Circuit because, although it grew out of the same facts as in the original charge, it alleged a legal claim distinct from his initial claim of racial discrimination. However, had the petitioner been in one of the Circuits allowing amendments alleging additional legal claims to relate back when the amendment flows from the same facts as in the original charge, he would have had the opportunity to present his retaliation claims to a jury.

This case presents squarely for review the sole issue of what standard should guide federal courts in determining when amendments to an EEOC charge relate back to the date of the original charge. The Writ of Certiorari should be issued to resolve this mature and irreconcilable conflict among the Circuits.

II.

THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

The decision below decides an important question in a way that fundamentally undermines Congress' intent in establishing the Title VII administrative and litigative processes. The court interprets the EEOC regulation in a manner that is wholly inconsistent with the Title VII enforcement scheme. Under the Tenth Circuit rule, laymen must act with the knowledge and precision of trained lawyers or risk losing the right to pursue their legal claims. The opinion below, therefore, threatens the effectiveness of Title VII as a tool to combat employment discrimination.

In *Sanchez*, the court carefully and precisely spelled out why complainants must be granted latitude in identifying the legal claims in their EEOC charges:

> While the distinction between [ ] two types of discrimination will undoubtedly be crystal clear to a lawyer delving into the law books to research a legal question, it may not be so apparent to an uneducated layman who is required to put pen to paper and, by filling out a form, to articulate his grievance as best he can without expert legal advice.

431 F.2d at 463 n.4 (internal citations omitted). This reality necessitates liberal construction of procedural rules if the

rights of Title VII plaintiffs are to be adequately protected.

Congress and the EEOC created a "user-friendly" administrative system for the assertion of rights under Title VII and other antidiscrimination statutes that enables lay complainants to present their claims initially, without the assistance of attorneys.[9] *See Zipes v. Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants*, 455 U.S. 385, 397 (1982); *Love v. Pullman*, 404 U.S. 522, 527 (1972). This important objective is served by simplicity and flexibility in the procedural requirements for asserting discrimination claims.

The objective of requiring a charging party to exhaust his administrative remedies by filing a charge with the EEOC is to place the charged party on notice of alleged violations, to give the EEOC sufficient information to investigate, and to provide the parties an opportunity to conciliate. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997); *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127 (7th Cir. 1989); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 905 (7th Cir. 1981). The rule adopted by the Tenth Circuit undermines the administrative scheme adopted by Congress for this purpose.

Where, as here, the EEOC has thoroughly investigated the charge as amended and provided the parties with an opportunity to conciliate all claims, the purpose of the statutory exhaustion requirement is not furthered by denying a complainant the opportunity to pursue those claims in federal court. In addition, the respondent cannot be said to have been prejudiced in any manner if petitioner

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[9]In fact, EEOC regulations explicitly state that its "rules and regulations shall be liberally construed to effectuate the purpose and provisions of title VII . . . ." 29 C.F.R. §1601.34.

is permitted to proceed on his retaliation claim.[10]

The opinion below is also inconsistent with the established procedure for filing a charge of discrimination with the EEOC. One avenue for filing a charge with the EEOC is to complete a charge form. On the form, the complainant is instructed to indicate the cause of discrimination by checking the box or boxes that describe the type of discrimination suffered from among several listed.[11] Next, the form requests the complainant to provide a statement describing the alleged discriminatory action. The form contains no additional instructions alerting complainants to the significance of the selection of which boxes to check. In this case Mr. Simms' failure to check the "retaliation" box had the consequence, in the view of the court below, of completely cutting off his right to bring his retaliation claims before a court even though they were

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[10]For example, once petitioner's original 1994 charge was filed, respondent was required to preserve all of its "personnel records relevant to the charge" until its final disposition. 29 C.F.R. §1602.14. The regulation continues:

> The term "personnel records relevant to the charge," for example, would include personnel or employment records related to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person . . . .

It is inconceivable in light of this regulation that a respondent charged with denying a specific promotion based on race could justifiably assert that it was led by such a charge to discard records relevant to rebutting a claim of retaliation in denying the promotion, so that its defense has been prejudiced. Certainly no such assertion was ever made here.

[11]Mr. Simms' original and amended EEOC charges of discrimination are reproduced in the Appendix following pp. 29a and 31a.

investigated and unsuccessfully conciliated by the EEOC.

Ironically, the court below is enforcing a more rigorous administrative "pleading" requirement than is imposed on plaintiffs represented by attorneys in federal district court in two respects. First, under Federal Rule of Civil Procedure 15(c)(2), an amendment to a pleading relates back to the date of the original pleading if "the claim or defense asserted in the amended pleading arose out of the conduct, *transaction*, or *occurrence* set forth or *attempted to be set forth* in the original pleading." FED. R. CIV. P. 15(c)(2) (emphasis added). Courts have interpreted this rule so that

> a new substantive claim that would otherwise be time-barred relates back to the date of the original pleading, provided the new claim stems from the same 'conduct, transaction, or occurrence' as was alleged in the original complaint; for relation back to apply, there is no additional requirement that the claim be based on an identical theory of recovery.

Bularz v. Prudential Ins. Co. of Am., 93 F.3d 372, 379 (7th Cir. 1996); *accord Pena v. United States*, 157 F.3d 984, 987 (5th Cir. 1998); *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1543 (8th Cir. 1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir. 1993); *Federal Deposit Ins. Corp. v. Bennett*, 898 F.2d 477, 479-80 (5th Cir. 1990).[12]

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[12]*Cf. City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, __, 139 L. Ed. 2d 525, 535-36 (1997), holding that the supplemental jurisdiction of federal courts extends to

> state law claims that "derive from a common nucleus of operative fact," such that "the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'" . . . The state and federal claims "derive

Second, the Tenth Circuit approach contrasts starkly with the liberal pleading requirements of FED. R. CIV. P. 8(a). Rule 8(a) requires that pleadings in federal court contain "a short and plain statement of the claim showing that the pleader is entitled to relief"; it does not require the plaintiff to plead legal theories. FED. R. CIV. P. 8(a)(2); *B. Sanfield, Inc. v. Finaly Fine Jewelry Corp.*, 168 F.3d 967, 973 (7th Cir. 1999); *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 730, n.8 (7th Cir. 1998). *See also* FED. R. CIV. P. 8(e)(1). This interpretation of Rule 8 "indicates the objective of the rules to avoid technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the claim . . . ." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1215, 136-138 (1990); *accord Caribbean Broad. System, Ltd., v. Cable & Wireless PLC*, 148 F.3d 1080, 1085-86 (D.C. Cir. 1998).

Similarly, under EEOC regulations, a Title VII complainant's EEOC charge need only "describe generally the action or practices complained of"; complainants are not required to articulate in their EEOC charges the precise legal theories which they will later assert in a Title VII lawsuit. 29 C.F.R. §1601.12(b); *accord Oates v. Discovery Zone*, 116 F.3d 1161, 1176 (7th Cir. 1997)(D. Wood, J. concurring in part and dissenting in part)("it is enough both for EEOC charges . . . and for federal complaints to set forth the facts that will form a basis for relief[; p]laintiffs are not under any legal obligation to plead legal theories");

> from a common nucleus of operative fact," *Gibbs*, supra, at 725, namely, ICS's unsuccessful efforts to obtain demolition permits from the Chicago Landmarks Commission.

(bracketed material in original), *quoting United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

Bridges v. Eastman Kodak Co., 822 F. Supp. 1020, 1026 (S.D.N.Y. 1993) (plaintiffs are not required to state legal theories in their EEOC charges); *cf. Sanchez*, 431 F.2d at 463 ("the only absolutely essential element of a timely charge of discrimination is the allegation of fact contained therein"). The ruling below requires the lay person to go beyond accurately describing all relevant facts, to denominate precisely the legal implications of those facts. This is contrary to Congressional intent and defeats the objectives of the EEOC administrative process.

The Tenth Circuit's approach also compromises the "scope of the investigation" rule. This doctrine

> revolves around the principle that the scope of a [Title VII] civil action is not determined by the specific language of the charge filed with the agency, but rather, may encompass acts of discrimination which the [ ] investigation could reasonably be expected to uncover.

Conroy, 758 F. Supp. at 58; *accord Robinson v. H. Dalton*, 107 F.3d 1018, 1025 (3rd Cir. 1997) (discussing "scope of investigation" rule); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 481 (7th Cir. 1996)(discussing "like or reasonably related" doctrine[13]); *Washington v. Jenny Craig Weight Loss Centres*, 3 F. Supp.2d at 947-48 (N.D.Ill. 1998)(discussing "scope of investigation" and "like or reasonably related" rules). Courts have liberally interpreted this requirement to ensure that meritorious claims are not turned aside because of procedural technicalities. *See Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994);

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[13]The scope of the investigation rule and the "like or reasonably related" doctrine are essentially the same inquiry. *See Washington v. Jenny Craig Weight Loss Centres*, 3 F. Supp. 2d 941, 947 (N.D. Ill. 1998).

Jenny Craig, 3 F. Supp. 2d at 947.

Wholly inconsistent with this well-settled doctrine, the Tenth Circuit has adopted an approach that makes the legal claims, rather than the facts, the focus of the EEOC charge and would disallow any claim or amendment not articulated in the original complaint. In contrast, the "scope of the investigation" rule provides that "where the factual statement in a plaintiff's written charge should have alerted the agency to an alternative basis of discrimination, and should have been investigated, the plaintiff will be allowed to allege this claim in his or her complaint regardless of whether it was actually investigated." *Conroy*, 758 F. Supp. at 58.

Mr. Simms' case typifies the potential for injustice in jurisdictions that follow the Tenth Circuit approach. As a result of the Tenth Circuit's narrow construction, Mr. Simms was effectively barred from vindicating his rights because of steps he took during the administrative process while unrepresented by counsel. Although his original claim of race discrimination was found to be timely, he was barred from pursuing a claim that the EEOC found cause to believe was true simply because he did not check the appropriate box on his EEOC charge form. Because this approach frustrates the national policy of extirpating employment discrimination that is embodied in Title VII, this Court should grant review to correct this error.

III.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT

The standard applied by the Tenth Circuit is inconsistent with this Court's rulings concerning the technical burdens that should be placed on Title VII complainants at the start of the administrative process and the level of deference that should be given to the EEOC's interpretation of the statute and of its own regulations.

A. Avoiding the Imposition of Technical Requirements upon Lay Persons

This Court's opinions in *Love v. Pullman*, 404 U.S. 522 (1972)[14] and *Zipes v. Trans World Airlines, Inc. Indep. Fed'n of Flight Attendants*, 455 U.S. 385 (1982)[15] gave effect

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[14]In *Love*, the Tenth Circuit affirmed a grant of summary judgment on the grounds that the plaintiff had failed to exhaust his state remedies where his charge was tendered to the EEOC, the EEOC referred the charge to the state agency, and then the EEOC formally filed it once the state deferral agency indicated that proceedings before it were terminated. By this time the charge would have been time-barred had it not earlier been presented to the EEOC. 404 U.S. at 525. In reversing the decision of the Tenth Circuit, this Court held that the filing procedure followed there fully complied with the purpose of the filing requirements and that the respondent could make no showing of prejudice to its interests. *Id.* at 526. Moreover, the Court held that the procedure endorsed by the Tenth Circuit "would serve no purpose other than the creation of an additional procedural technicality," inappropriate where laymen are acting without the assistance of counsel. *Id.* at 526-27.

[15]In *Zipes*, this Court, based on the principle enunciated in *Love*, held that the time for filing a charge with the EEOC was not jurisdictional, but was a limitations period subject to waiver and equitable tolling.

to a guiding principle for construing the provisions of Title VII: the procedural requirements of Title VII should not be applied with technical stringency to the claims of uncounselled complainants. *Zipes*, 455 U.S. at 397; *Love*, 404 U.S. at 527; *cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 816, n.19 (1980) ("[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen unassisted by trained lawyers initiate the process'")(quoting *Love*).[16]

The ruling below departs from this tradition. It neither promotes the requirements of Title VII nor respects the realities of the lay-initiated administrative process.[17]

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[16]As *Mohasco* demonstrates, this Court has held lay complainants to precise requirements of which they would reasonably be made aware by a reading of the statute. But this is a far cry from penalizing a lay person for checking the wrong box on a form -- especially absent a showing of prejudice to the entity charged.

[17]Unfortunately, this is only one example of the general problem of plaintiffs finding themselves limited by actions taken without benefit of counsel during the administrative process. For example, some courts have refused to permit a charging party to bring a class action suit under FED. R. CIV. P. 23 unless the charge itself used the word "class," even though on the EEOC's form there is no box to check to indicate the complainant's desire to raise class claims and no instructions alerting complainants that special care must be given to preserve the right to bring a class action. Other courts, cognizant that complainants may be unaware of what "key words" can trigger class action notification, are more generous in construing the charge. *E.g.*, *Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996); *Fellows v. Universal Restaurant*, 701 F.2d 447, 451 (5th Cir. 1983).

Paralleling the situation with respect to "relation back" of amendments to charges, there is a conflict among the Circuits as to class actions. The Ninth and Fifth Circuit have adopted approaches liberally construing charges and allowing class claims where an EEOC investigation of class discrimination could reasonably be expected to

B. Deference to Agency Interpretations

The Tenth Circuit also failed to afford the EEOC's interpretation of its regulations the appropriate level of deference. It is well settled that

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

Chevron v. Natural Resources Defense Council, Inc., 467 U.S.

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check to indicate the complainant's desire to raise class claims and no instructions alerting complainants that special care must be given to preserve the right to bring a class action. Other courts, cognizant that complainants may be unaware of what "key words" can trigger class action notification, are more generous in construing the charge. *E.g.*, *Paige v. California*, 102 F.3d 1035, 1041 (9th Cir. 1996); *Fellows v. Universal Restaurant*, 701 F.2d 447, 451 (5th Cir. 1983).

Paralleling the situation with respect to "relation back" of amendments to charges, there is a conflict among the Circuits as to class actions. The Ninth and Fifth Circuit have adopted approaches liberally construing charges and allowing class claims where an EEOC investigation of class discrimination could reasonably be expected to grow out of the allegations in the charge. *See e.g.*, *Paige*, 102 F.3d at 1041 (EEOC charge alleging discriminatory denial of promotion could support action challenging overall promotional process); *Fellows*, 701 F.2d at 451 (allowing class claims because allegation in charge that plaintiff discriminated against "because of my sex, female" could lead to EEOC investigation of class discrimination). The Seventh Circuit has taken a more restrictive view of the requirement, essentially ignoring the actual or potential scope of the EEOC investigation. *See, e.g. Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 128 (7th Cir. 1989)(court found charge, which led to investigation that sought "payroll records for all sales persons and an explanation for the differences between the salaries of male and female sales persons," insufficient to support class action).

837, 843 (1984), *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974)(alteration in original). Furthermore, "such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

In accepting, investigating, and attempting to conciliate Mr. Simms' amended EEOC charge, the EEOC interpreted its regulation to allow Title VII complainants to amend their charge to include new legal theories that grow out of the operative facts articulated in the original charge. Under the standard established in *Chevron*, the Tenth Circuit should have given deference to the EEOC's interpretation of the statutory and administrative scheme. First, Congress has given the EEOC explicit "authority from time to time to issue . . . suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. §2000e-12(a). Second, the regulation at issue goes to the heart of the EEOC's role in the enforcement of Title VII: investigating and conciliating charges of discrimination in the first instance. Finally, this approach, as discussed above, is consistent with the language, purpose and enforcement scheme of Title VII. Accordingly, the Tenth Circuit should have given greater deference to the EEOC's interpretation of 29 C.F.R. §1601.12(b).[18]

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[18]Decisions of this Court giving limited deference to EEOC interpretations have done so recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC [general] authority to promulgate rules or regulations." *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). In those circumstances the level of deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 141. The EEOC interpretation of 29 C.F.R. §1601.12(b) should be given greater deference because Congress has given the EEOC explicit authority to issue procedural regulations. 42 U.S.C. §2000e-12(a).

The Writ of Certiorari should be issued to address the conflict between the foregoing decisions of this Court and the decisions below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

PUBLISH
No. 97-6366
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CEDRIC D. SIMMS,
Plaintiff-Appellant,

v.

THE STATE OF OKLAHOMA,
ex. rel., The Department of
Mental Health and Substance Abuse
Services, a state agency,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D. Ct. No. CIV-96-2158-A)

Before **Tacha, Briscoe,** and **Murphy,** Circuit Judges.

Tacha, Circuit Judge.

Plaintiff-Appellant Cedric D. Simms appeals two orders of the district court granting summary judgment in favor of defendant, the Oklahoma Department of Mental Health and Substance Abuse Services ("DMHSAS") on claims of unlawful employment discrimination and retaliation. On appeal, plaintiff argues that: (1) his pre-1995 retaliation claims are not time-barred and (2) the district court erred in granting summary judgment on his failure to promote claim because he presented sufficient evidence of pretext, creating a genuine dispute as to an issue of material fact. We exercise jurisdiction pursuant to 28 U.S.C.§ 1291 and affirm.

The procedural history of this case is somewhat complicated. Mr. Simms, an African-American, began his employment with defendant at Griffin Memorial Hospital around April 29, 1991, as a Fire and Safety Officer I. On September 11, 1991, defendant posted a job announcement for the position of Fire and Safety Officer II. Mr. Simms applied for the position, but defendant gave it to a white employee whom he thought was less qualified. Consequently, he filed a charge with the Equal Employment Opportunity Commission ("EEOC") on October 12, 1992 (No. 311930053), alleging that defendant refused to promote him because of his race. The EEOC issued a right-to-sue letter and, on December 21, 1993, Mr. Simms filed an action in federal court pursuant to Title VII of the Civil Rights Act ("Title VII"). The parties settled this action ("Simms I") on April 13, 1994. Under the settlement agreement, defendant promoted Mr. Simms to the position of Fire and Safety Officer II. Although the court stated that DMHSAS should waive its standard six-month probationary period for plaintiffs, defendant's employees Carol Kellison and Stand LaBoon withheld Mr. Simms' supervisory duties until June 20, 1994.

Ten days later, defendant posted a job announcement for the position of Fire and Safety Officer Supervisor. The job announcement stated that "PREFERENCE WILL BE GIVEN TO APPLICANTS WITH SUPERVISORY EXPERIENCE." Appellant's App. at 376. Mr. Simms applied and interviewed for the position. Mr. Simms and Bruce Valley, a white employee under Mr. Simms' supervision but who had numerous years of supervisory experience in the construction industry, received the highest scores in the first round of interviews. A panel including Carol Kellison and Stand LaBoon interviewed both men in a second round and ultimately gave the promotion to Mr. Valley. As a result, Mr. Simms filed a second EEOC charge (No. 311950136) on October 31, 1994, alleging that defendant unlawfully failed to promote him based on his

race.

After filing the second EEOC charge, Mr. Simms' relationship with the defendant deteriorated. In March 1995, defendant reprimanded him for "distribution of unauthorized material" and, in April 1995, defendant suspended him for "insubordination, not devoting full time, attention and effort to the duties and responsibilities of position during assigned hours of duty, and failure or inability to perform the duties in which employed." Appellant's App. at 83. On June 5, 1995, Mr. Simms filed a third EEOC charge (No. 311950898) alleging that these acts were in retaliation for filing and pursuing his second EEOC charge. On July 20, 1995, Mr. Simms received his first adverse job performance evaluation. Defendant demoted him to Fire and Safety Officer I on August 13, 1995, and ultimately terminated his employment on September 22, 1995.

On November 29, 1995, Mr. Simms received an EEOC right-to-sue letter regarding his third EEOC charge. He brought aa Title VII action in federal court ("Simms II") on January 12, 1996, alleging race-based employment discrimination and retaliation, including allegations of retaliatory acts occurring prior to 1995 and not covered by his third EEOC charge. At the time he commenced Simms II, he had not yet received a right-to-sue letter for his second EEOC charge. On July 13, 1996, DMHSAS filed a motion for partial summary judgment on the grounds that Mr. Simms had failed to exhaust his administrative remedies as to his race discrimination and pre-1995 retaliation claims. Two days later, Mr. Simms filed an amendment to his second EEOC charge. The amendment contained allegations of pre-1995 acts of retaliation, including withholding of supervisory duties for the Fire and Safety Officer II position and failure to promote him to the Fire and Safety Supervisor position. On September 3, 1996, the district court granted defendant's motion for partial

summary judgment, leaving only the post-1995 retaliation claims for trial.

The EEOC completed its investigation of the second EEOC charge on September 25, 1996, and issued a letter of determination stating that it found "reasonable cause to believe the charge is true." Appellant's App. at 274. A right-to-sue letter followed on October 2, 1996. Based on these events, plaintiff asked the district court to reconsider its September 3 Order in Simms II. The court denied Mr. Simms' motion for reconsideration on October 23, 1996. On December 31, 1996, plaintiff brought the present action ("Simms III") reasserting the claims that were dismissed in Simms II for failure to exhaust administrative remedies.

On January 6, 1997, Simms III was transferred to the district court judge presiding over Simms II, and plaintiff filed a motion to consolidate the two cases. The district court denied the motion because it would delay Simms II, which was set for trial in a week. The remaining claims in Simms II were tried to a jury. The jury found in favor of DMHSAS on the retaliatory discharge claim, but found against DMHSAS on the other post-1995 retaliation claims (the reprimand, suspension, negative performance evaluation, and demotion). On February 26, 1997, the trial court entered judgment in accordance with the jury's verdict.

On June 16, 1997, DMHSAS filed a motion for partial summary judgment in Simms III, claiming that Mr. Simms' pre-1995 retaliation claims were time-barred and did not relate back to his original second EEOC charge. The trial court granted the motion on September 3, 1997, holding that Mr. Simms failed to exhaust administrative remedies. The district court found Mr. Simms' amendment to his second EEOC charge neither timely nor related to the activities contained in the original charge. On September 11, 1997, defendant filed a summary judgment motion with respect to plaintiff's remaining claims in Simms III. The

court granted defendant's motion on October 23, 1997. The trial court denied plaintiff's motion for reconsideration of the two orders, and this appeal followed.

Standard of Review

We review the district court's grant of summary judgment de novo, applying the same legal standard used by the district court. *See Byers v. City of Albuquerque* 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine-issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Byers*, 150 F.3d at 174.

Although the movant must show the absence of a genuine issue of material fact, he or she need not negate the nonmovant's claim. *See, e.g., Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). Once the movant carries this burden, the nonmovant cannot rest upon his or her pleadings, but "must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [he or she] carries the burden of proof." *Id.* "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is "genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997). If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996).

I. Pre-1995 Retaliation Claims - Exhaustion Doctrine

A plaintiff must generally exhaust his or her administrative remedies prior to pursuing a Title VII claim in federal court. *See, e.g., Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). Thus, a plaintiff normally may not bring a Title VII action based upon claims that were not part of a timely-filed EEOC charge for which the plaintiff has received a right-to-sue letter. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997). To be timely, a plaintiff must file the charge with the EEOC within 180 days or with a state agency within 300 days of the complained-of conduct. *See* 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.13 (1998); *Gunnell v. Utah Valley St. College*, 152 F.3d 1253, 1260 n.3 (10th cir. 1998). However, 29 C.F.R. § 1601.12(b) provides that certain amendments may relate back to the filing date of the original charge and, therefore, be considered timely even if the amendment takes place after the deadlines set forth in § 1601.13. To relate back, an amendment must (1) correct technical defects or omissions; (2) clarify or amplify allegations made in the original charge; or (3) add additional Title VII violations "related to or growing out of the subject matter of the original charge." *Id.* § 1601.12(b).

Mr. Simms argues that the 1996 amendment to his second EEOC charge complies with § 1601.12(b) and that his pre-1995 retaliation claims are therefore part of a timely-filed EEOC charge. For this to be true, the amendment must have either clarified or amplified allegations made in Mr. Simms' second EEOC charge or addressed matters that related to or grew out of the race discrimination claim in that charge.[1] We agree with the district court that the 1996

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[1]Mr. Simms' amendments are not technical amendments (e.g., correcting a name or address), rather they go to the substance of the charge.

amendment did not clarify or amplify allegations in the second EEOC charge because the original charge, even when construed liberally, contained no mention of the theory of retaliation or facts supporting such a claim.

Whether the pre-1995 retaliation claims contained in the 1996 amendment related to or grew out of the race discrimination claim in the second EEOC charge is a closer question. Some courts have held that this language encompasses claims based on different legal theories that derive from the same set of operative facts included in the original charge. *See Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th cir. 1985); *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-76 (8th Cir. 1982); *Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304, 1310 (D. Kan. 1997); *Conroy v. Boston Edison Co.*, 758 F. Supp. 54, 58 (D. Mass. 1991); *cf. Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 575 (7th Cir. 1998) (stating that disability discrimination claim would not relate back to age discrimination claim, but court might have been more sympathetic had plaintiff "alleged facts that supported both claims" in the first complaint).[2] Other courts have concluded that an amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint. *See Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996) (denying relation back for age discrimination claim to sex discrimination claim); *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 675 (9th Cir. 1988) (same); *Hopkins v. Digital Equip. Corp.*, 1998 WL 702339, at *2 (S.D.N.Y. Oct. 8, 1998) (stating that retaliation and disability claims in amended charge did not relate back to date of

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[2]Some courts have gone further and held that an "amendment is said to grow out of the same subject matter as the initial charge where the protected categories are related, as is the case, for example, with race and national origin." *Conroy*, 758 F. Supp. at 58. That, however, is not the case here.

original charge, which only alleged race discrimination, "even though those claims are based on incidents described in the original charge, since neither disability nor retaliation claims flow from race discrimination claims"). In *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1260 n.3 (10th Cir. 1998), this court followed the latter position, noting that when an original EEOC claim alleged only retaliation, plaintiff's amendment to add a sexual harassment claim did not relate back to the original charge pursuant to 29 C.F.R. § 1601.12(b). Applying the analysis from *Gunnell*, we hold that Mr. Simms' retaliation charge does not relate back under § 1601.12(b) because his 1996 amendment alleges a new theory of recovery, retaliation, that he did not raise in the second EEOC charge. Prohibiting late amendments that include entirely new theories of recovery furthers the goals of the statutory filing period - giving the employer notice and providing opportunity for administrative investigation and conciliation. *See Evans*, 80 F.3d at 954; *cf. Ingels v. Thiokol Corp.*, 42 F.3d 616, 625 (10th Cir. 1994) (finding exhaustion is not required for a retaliation claim filed during the pendency of a discrimination claim and based on acts that occurred *after* the filing of the discrimination claim because the employer already has notice and there is little chance a second administrative complaint would lead to conciliation). Therefore, Mr. Simms' pre-1995 retaliation claims were not part of a timely-filed EEOC charge, and he has not exhausted his administrative remedies with respect to these claims.

Even though Mr. Simms did not properly exhaust administrative remedies, our inquiry as to whether this court may hear the retaliation claims has not come to an end. This court has adopted a limited exception to the exhaustion rule for Title VII claims when the unexhausted claim is for "discrimination like or reasonably related to the allegations of the EEOC charge." *Ingels*, 42 F.3d at 625 (quoting *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 864 F.2d 680, 682 (10th cir. 1988)). We have construed the "reasonably related"

exception to include most retaliatory acts *subsequent* to an EEOC filing. *See Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 342 (1997). "However, where a retaliatory act occurs *prior to the filing* of a charge and the employee fails to allege the retaliatory act or a retaliation claim in the subsequent charge, the retaliatory act ordinarily will not reasonably relate to the charge." Id. (emphasis added); *see also Hopkins*, 1998 WL 702339, at *3.

In *Seymore*, the plaintiff filed a discrimination complaint with the state human rights commission and was subsequently discharged from her job. She filed an EEOC complaint nine days after her termination which alleged race and sex discrimination. In district court, though, plaintiff also alleged retaliation. *See Seymore*, 111 F.3d at 796. This court found the plaintiff had failed to exhaust administrative remedies on the retaliation claim because she was aware of the facts constituting that claim at the time of her EEOC filing. *See id.* at 799-800. This case is analogous to *Seymore*. All of Mr. Simms' allegations of pre-1995 retaliation concerned facts occurring prior to the filing of the second EEOC complaint. Thus, Mr. Simms does not qualify for the "reasonably related" exception, and we may not excuse his failure to exhaust his administrative remedies with respect to his pre-1995 retaliation claims. We affirm the district court's grant of summary judgment in favor of defendant on these claims.[3]

II. Race Discrimination Claim - Pretext Analysis

In determining whether to grant summary judgment on a Title VII claim, we apply the burden-shifting

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[3]While plaintiff also included the post-1995 retaliation claims in his brief, he concedes that he is not attempting to relitigate these claims, upon which a jury passed judgment in Simms II.

framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this approach, the plaintiff initially bears the burden of production to establish a prima facie case of a Title VII violation. *See McDonnell Douglas*, 411 U.S. at 802. "To carry the initial burden of establishing a prima facie case of race discrimination for a failure to promote claim, the plaintiff must typically show that he or she (1) belongs to a minority group; (2) was qualified for the promotion; (3) was not promoted; and (4) that the position remained open or was filled with a non-minority." *Reynolds v. School Dist. No. 1, Denver, Colo.*, 69 F.3d 1523, 1534 (10th Cir. 1995). Once a plaintiff has met this burden, discriminatory intent on the part of the defendant is presumed and the burden shifts to the defendant to "articulate a facially nondiscriminatory reason for the challenged employment action." *Id.* at 1533; *see also Beaird v. Seagate Tech.*, 145 F.3d 1159, 1165 (10th Cir. 1998), *cert. denied.* --S. Ct.--, 67 U.S.L.W. 2182 (Dec. 14, 1998). If the defendant provides a nondiscriminatory reason for the employment action, the plaintiff may defeat summary judgment by presenting sufficient evidence such that a reasonable jury could conclude that the proffered nondiscriminatory reason for the employment action is pretextual, that is, "unworthy of belief." *See Beaird*, 145 F.3d at 1165 (quoting *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995)). *But cf. id.* at 1176 (Tacha, J., concurring in part, dissenting in part) ("Not only must the plaintiff produce evidence of pretext, but the pretextual evidence must be of the nature or quality from which a reasonable jury could infer illegal discrimination."). Evidence of pretext may include, but is not limited to, the following: prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating hiring criteria); and the use of subjective criteria. *See Colon-Sanchez v. Marsh*, 733 F.2d 78, 81 (10th Cir. 1984); *see also Beaird*, 145 F.3d at 1168.

Plaintiff has made a prima facie showing of race-based discrimination. He was qualified for the position of Fire and Safety Officer Supervisor, but DMHSAS awarded the job to Mr. Valley, a non-minority. However, DMHSAS has advanced a nondiscriminatory reason for its decision to promote Mr. Valley over Mr. simms: Mr. Valley was more qualified because he had significantly greater supervisory experience. Indeed, the record reflects that Mr. Valley's supervisory experience far exceeds that of Mr. Simms. Consequently, the issue becomes whether Mr. Simms has provided sufficient evidence that the reason advanced by DMHSAS is pretextual.

Mr. Simms offers a variety of evidence that he claims shows pretext. Although he does not directly attack the truthfulness of defendant's nondiscriminatory reason for promoting Mr. Valley (that Mr. Valley did not have more supervisory experience than Mr. Simms), Mr. Simms attempts to demonstrate that supervisory experience was not the true reason for the defendant's promotion decision. After careful review, we find that the evidence offered by Mr. Simms, even when taken in the light most favorable to plaintiff, is insufficient for a reasonable jury to conclude that defendant's proffered reason for failing to promote Mr. Simms is "unworthy of belief."

Mr. Simms claims that various "procedural irregularities" lead to an inference of pretext. The alleged irregularities include the decision to have a second round of interviews, testimony that the candidate with the highest first-round score is often selected for the job, the emphasis on supervisory experience in the job posting, and the fact that Stand LaBoon, the hospital superintendent, sat on the second round interview panel when he usually only interviews candidates for more senior positions. However, these allegations of procedural irregularities do not support a reasonable inference of pretext because they are consistent with the defendant's published policies for selecting

candidates for promotion. For example, the job posting itself indicated a second round of interviews might be held, and this was consistent with DMHSAS policy. Similarly, the fact that Simms scored slightly higher in the first round of interviews[4] does not show pretext, as the difference in scores is minimal and plaintiff provides no evidence showing DMHSAS has a policy of always hiring the candidate with the highest first-round score. To the contrary, the difference between Mr. Simms' and Mr. Valley's scores provides an explanation for why an additional round of interviews was warranted. The emphasis on supervisory experience in the job posting also raises no suspicions considering the job--Fire and Safety Officer *Supervisor*. Moreover, plaintiff has provided no evidence that the supervisory preference was illegitimate or that it was unusual to include such a preference in a supervisor job posting. *Cf. Randle*, 69 F.3d at 453-54 (denying employer's summary judgment motion in a failure to promote claim because employer's assertion that plaintiff was unqualified for a position due to insufficient education was called into question by the fact that the person who got the job also did not meet the education requirement listed in the job posting); *Mohammed v. Callaway*, 698 F.2d 395, 399-401 (10th Cir. 1983) (reversing entry of judgment for employer where employer hired non-minority who did not meet specific job education requirements over minority candidate who was fully qualified). Finally, the fact that Stand LaBoon sat on the interview panel is not particularly troubling, since he retained ultimate hiring discretion for the position. Additionally, Mr. LaBoon ranked the two candidates equally in his evaluation, while the other two panel interviewers scored Mr. Valley higher. In sum, there is nothing about the defendant's actions in the interview process to support a reasonable inference of pretext.

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[4]Mr. Simms scored 1,866 out of 2,000, whereas Mr. Valley scored 1,835 out of 2,000, a 1.55% difference.

Mr. Simms also argues that defendant based the decision not to promote him on subjective criteria. He claims that the fact that he scored higher than Mr. Valley in the first round of interviews is sufficient to show that factors other than supervisory experience were involved in and led to DMHSAS's promotion decision. We disagree. As mentioned earlier, even though plaintiff had the highest score after the initial round of interviews, the small difference between Mr. Simms' and Mr. Valley's scores is insufficient to indicate illegitimate factors came into play in the second round of interviews. *Cf. Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1458 (10th Cir. 1994) (finding employer's selection of a younger employee who had a college degree for a position over an older employee who had a higher departmental ranking but no degree created no reasonable inference of pretext in an age discrimination suit where the stated reason for hiring the younger employee was his degree). Mr. Simms places great weight on the fact that he had greater education and training as a fireman, which he claims made him ore objectively qualified for the job. However, an employee's "own opinions about his ... qualifications [do not] give rise to a material factual dispute." *Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir. 1996). While Mr. Simms may have had the edge in education and fire training, Mr. Valley had substantially greater supervisory experience. When two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, "it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria." *Colon-Sanchez v. Marsh*, 733 F.3d 78, 82 & n.1 (10th Cir. 1984); *accord Lujan v. Walters*, 813 F.2d 1051, 1057-58 (10th Cir. 1987).

In *Colon-Sanchez*, the first candidate had greater administrative and supervisory skills while the second had greater mechanical skills. Since the job description at issue discussed significant administrative and supervisory

responsibilities, we held that the employer's decision to hire the first candidate based on his administrative background raised no question of pretext. *See Colon-Sanchez*, 733 F.2d at 82. Similarly, DMHSAS's decision to hire Mr. Valley based on his supervisory experience is not the kind of subjective decision that, by itself, suggests pretext. *See Beaird*, 145 F.3d at 1169 (finding hiring decision based on employment performance grade over performance points, without more, "cannot reasonably be thought to evidence pretext"). Our role is to prevent unlawful hiring practices, not to act as a "super personnel department" that second guesses employers' business judgments. *Verniero v. Air Force Academy Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983); *see also, e.g., Rabinovitz*, 89 F.3d at 487.

Mr. Simms further asserts that defendant asked improperly subjective second round interview questions, thereby demonstrating pretext. However, he directs us to no questions that are unrelated to legitimate business considerations or blatantly subjective. Moreover, as we discussed above, he provides no evidence that he was so clearly better qualified than Mr. Valley that a jury could reasonably conclude that DMHSAS based its decision on something other than its proffered reason.

Mr. Simms also attempts to establish pretext by utilizing his employment history with DMHSAS to impute a discriminatory motive on the part of defendant. For example, Mr. Simms suggests that Stand LaBoon and Carol Kellison, who prevented him from immediately assuming his supervisory duties as Fire and Safety Officer II in 1994, somehow manipulated the entire supervisor selection process so that he would not receive the promotion. However, we can find nothing in this record to indicate that Mr. LaBoon and Ms. Kellison's involvement in the interview process was so irregular or inconsistent with the defendant's established policies as to make its hiring explanation unworthy of belief. To the contrary, their conduct is consistent with DMHSAS's

proffered nondiscriminatory reason for the promotion decision. While the fact that Mr. LaBoon and Ms. Kellison withheld Mr. Simms' supervisory duties is relevant, on this record, it is not enough to impute sinister motivations to them during the supervisor selection process.

Similarly, Mr. Simms attempts to establish pretext by reference to his prior settlement in Simms I, suggesting that because DMHSAS had settled a prior discrimination claim, its decision not to promote him to Fire and Safety Officer Supervisor was based on discriminatory motives rather than the reason proffered by defendant. Such a conclusive assertion is not probative of pretext unless the prior incidences of alleged discrimination can somehow be tied to the employment actions disputed in the case at hand. *Cf. Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994) (holding that isolated comments in an ADEA case must be linked to challenged employment action in order to show discriminatory animus); *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 531 (10th Cir. 1994) (finding stray comments in ADEA case were insufficient to create triable issue of fact unless they were related to the challenged action). Mr. Simms fails to establish such a connection, for he does not link any of the parties involved in the current employment action, particularly Mr. LaBoon or Ms. Kellison, to the employment actions that were the subject of the Simms I litigation.

In addition, Mr. Simms attempts to establish pretext by alleging that he was disciplined for reading on the job, whereas white employees were not. That event occurred in April 1991, years before defendant made the promotion decision at issue in this case. Thus, it is also not sufficiently connected to the employment action in question to demonstrate pretext. *See Rea*, 29 F.3d at 1457; *Cone*, 14 F.3d at 531.

Finally, Mr. Simms makes much of the fact that the EEOC had issued a favorable letter of determination regarding his claim of race-based failure to promote, and that he had presented the letter to the district court. However, when the independent facts before the district court judge fail to establish a genuine issue of material fact, a favorable EEOC letter of determination does not create one. *But see Mitchell v. Office of Los Angeles County Superintendent of Schools*, 805 F.2d 844, 847 (9th Cir. 1986) (stating that "an EEOC finding of reasonable cause is 'sufficient at least to create an issue of fact' requiring proceedings beyond the summary judgment stage") (quoting *Gifford v. Atchison, Topeka, & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 (9th Cir. 1982)).

Even considering Mr. Simms' circumstantial evidence in its totality, as we must, *see Beaird*, 145 F.3d at 1174, plaintiff has provided insufficient evidence for a reasonable jury to conclude that defendant's proffered reason for not promoting Mr. Simms--that Mr. Valley was more qualified--was unworthy of belief. Consequently, plaintiff has failed to meet his burden of production and the district court appropriately granted summary judgment in favor of defendant on Mr. Simms' race discrimination claim.

Conclusion

For the reasons discussed above, we conclude that the district court did not err in granting summary judgment in favor of the defendant in either its September 3 or October 23 Order. AFFIRMED.

No. CIV-96-2158-A
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CEDRIC D. SIMMS,
Plaintiff,

v.

THE STATE OF OKLAHOMA ex rel., THE DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES, a State Agency.
Defendant.

ORDER

Before the Court is the motion for partial summary judgment filed by defendant on June 16, 1997.[5] The Court is familiar with the parties in this case, as this is the second such case this year. In fact this is the third complaint filed by Mr. Simms against his former employer.

Plaintiff has filed three EEOC charges in the course of these proceedings: No. 311930053 (the 1992 charge), No. 311950136 (the 1994 charge), and No. 311950898 (the 1995 charge).

Plaintiff's first complaint against his then employer, the Department of Mental Health, was filed in 1993 and was

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[5]Plaintiff's original response to this motion, filed July 7, 1997, included a cross motion. Plaintiff then filed a second response on July 21, 1997. The second response withdrew the first response and "replaced" it. As the second response contained no reference to a cross motion, the cross motion is withdrawn and will not be considered by the Court.

settled by the parties. His second complaint (Simms II) was filed on January 12, 1996. The complaint in Simms III alleged continuing discrimination and retaliation. The allegations in the complaint were based upon the 1994 charge and the 1995 charge that plaintiff filed with the EEOC. The 1994 charge alleged racial discrimination that occurred on August 15, 1994. At the time the complaint in Simms II was filed, the plaintiff had not received a right-to-sue letter from the EEOC on that charge. By order dated Sept. 3, 1996, the Court dismissed the claims of discrimination and retaliation relating to the 1994 EEOC charge because plaintiff had not received a right-to-sue-letter. Other claims were decided by a jury on February 26, 1997.

Plaintiff received a right-to-sue-letter on the 1994 charge on October 2, 1996. On December 31, 1996, Plaintiff filed his third complaint (Simms III). This complaint, now pending before this Court, comprises four counts of discrimination and retaliation. Simms III includes allegations of retaliation similar to those dismissed in Simms II. Defendant argues for summary judgment on the claims of retaliation.

Summary Judgment Standard

Summary judgment is appropriate if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977).

In his response, plaintiff states that he "generally objects, denies and controverts in its entirety Defendant's

recitation of the facts." However, plaintiff's specific objections are not so much objections to the substance of defendant's version of the facts as a mere statement that the facts set out by defendant are not material.[6] Plaintiff goes on to set out his own version of undisputed material facts, and defendant has not objected to them. The Court concludes that there is no genuine issue of material fact, and thus the retaliation claims are a proper subject for summary judgment. Facts will be considered in the light most favorable to the non-moving party.

Exhaustion

A plaintiff must exhaust all administrative remedies before he may file a suit in federal court. *Khader v. Aspin*, 1 F.3d 968, 970 (10th Cir. 1993). This means that each claim set out in plaintiff's complaint must have been part of a previous EEOC charge for which plaintiff received a right-to-sue-letter. The exception to this rule is that claims reasonably related to the allegations of an EEOC charge may be included in the complaint. "When an employee seeks judicial relief for incidents not listed in his original charge to the EEOC, the judicial complaint nevertheless may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Brown v. Hartshorne Public School District*, 864 F.2d 680, 682 (10th Cir. 1988).

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[6]Plaintiff made one objection to the substance of defendant's facts. As Plaintiff notes, defendant's undisputed fact number 5 is a conclusion rather than a fact. However, the facts supporting number 5 are set out in supporting documents and appear to be undisputed.

Amendment of the 1994 Charge

On October 31, 1994, plaintiff filed the 1994 EEOC charge. Plaintiff checked the box on the form that indicated race discrimination. He did not check the box indicating retaliation as a claim. Plaintiff described the alleged discrimination in the box marked "THE PARTICULARS ARE," as follows:

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in Violation of Title VII of the Civil Rights Act of 1964, as amended.

On July 15, 1996, plaintiff amended the 1994 charge adding claims of retaliation and continuing action. Plaintiff described the alleged retaliation in the box marked "THE PARTICULARS ARE," as follows:

I. Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held (sic) from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer supervisor.

II. The reasons given for withholding of supervisory duties and other disciplinary action, I believe were pretextual. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

The complaint in Simms III indicates that plaintiff believes the claims of retaliation are administratively exhausted by the amendment. A copy of the amended charge is attached to the complaint and is referred to specifically in paragraphs 22 and 32 of the complaint.

Each instance of retaliation described in the amendment occurred more than 300 days before July 15, 1996, the date when the amendment was filed. Three hundred days is the longest period of time that may elapse before the timely filing of an EEOC charge. 29 C.F.R. § 1601.13. Plaintiff apparently intended that the retaliation in the amendment to the charge relate back to the discrimination charged in the 1994 charge and thus avoid the statute of limitations.

Amendment of an EEOC charge is permitted "to cure technical defects or omissions ... or to clarify and amplify allegations made therein. such amendments and amendments alleging unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first

received." 29 C.F.R. § 1601.12. For the July 15, 1995 amendment to relate back to the original date of filing, it would have to either be a clarification or amplification of the original charge, or to related to or growing out of the original charge.

EEOC charges will be liberally construed in recognition of the fact that they are drafted by laymen. a liberal construction of the original 1994 filing does not yield any indication of retaliation as a claim. Thus, the amendment cannot be a clarification or amplification of the original claim. Because the alleged retaliation in the amendment occurs contemporaneously (failure to promote) or earlier in time than the alleged race discrimination in the original 1994 charge, it is impossible for the amendment to be related to or growing out of the subject matter of the original charge. The Court finds that the amendment does not relate back. The Court finds that the July 15, 1996 amendment of the 1994 charge was improper. Plaintiff may not add claims out of time simply by titling them "amendment." The retaliation claims in Simms III are not administratively exhausted because they have not been the subject of a valid EEOC charge.

Reasonably Related

Plaintiff argues that his retaliation claims are properly before the Court because they are reasonably related to EEOC charges. Plaintiff appears to argue alternatively that they are related to the 1994 charge and the 1992 charge. To determine whether they are reasonably related, the Court will address the substance of the retaliation claims alleged in Simms III. Counts I and II allege retaliation.

Count I lists what plaintiff characterizes as "continuing" violations. They consist of a number of policy decisions made by agents of defendant in 1994. Each instance listed occurs before August 14, 1994, the date of the

discrimination alleged in the 1994 EEOC charge. Paragraph 28, subparagraphs l-m, of the complaint list instances of alleged retaliation that occurred in 1995.[7] The parties do not specifically address the 1995 allegations of retaliation, so the Court assumes they are not part of the motion for partial summary judgment.

Plaintiff argues that the retaliation was continuing so that in part it is later in time than the alleged discrimination. The "continuing" violations were the continuing enforcement or implementation of policies that were enacted prior to August 14, 1994. "[W]here a retaliatory act occurs prior to the filing of a charge and the employee fails to allege the retaliatory act or a retaliation claim in the subsequent charge, the retaliatory act ordinarily will not reasonably relate to the charge." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 799 (10th Cir. 1997). Acts occurring earlier in time than the alleged discrimination cannot be reasonably related to the discrimination.

Count II alleges failure to promote, which is the exact substance of the discrimination claim in the 1994 EEOC charge. The rule described in *Seymore* indicates that reasonably related means that the retaliatory action is in retaliation for filing the EEOC charge. In this case, if the motive for failing to promote was both race discrimination and retaliation, then the retaliation would have to be related to earlier protected activity. The Court finds that the retaliation alleged Count I and Count II of Simms III is not reasonably related to the 1994 EEOC charge.

In his response to the motion for partial summary judgment, plaintiff argues that the retaliation charges

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[7]The Court was astonished to find that these instances are the claims of retaliation already presented to the jury in Simms II. Defendant has not raised the defense of estoppel to these claims.

reasonably relate to the 1992 charge. Plaintiff's brief constantly stresses the word "original" in citing the rule that acts reasonably related to the original charge need not be included in an EEOC charge. Plaintiff reads this to mean that anything reasonably related to the 1992 charge (plaintiff's first and therefore original charge) is properly before the Court.

In *Seymore, Id.*, the Court of Appeals made it clear that this rule allows acts that reasonably relate to a *pending* charge. *Id.* at 799-800. The 1992 charge is not pending as it was settled and administratively closed on April 22, 1994. If plaintiff was aware of the acts of alleged retaliation during the pendency of the 1992 charge, he could have included them in that action. Otherwise, the proper course would have been to file a timely EEOC charge alleging retaliation or to state of claim of retaliation in the 1994 charge. He failed to do so. Therefore, the claims of retaliation occurring before 1995 that are alleged in Counts I and II of Simms III are time barred.

Conclusion

The claims of retaliation occurring before 1995 in Counts I and II are not properly before the Court. Partial summary judgment is GRANTED to defendant as to claims alleged in paragraph 26, and paragraph 28, subparagraphs a-h of Count I, and Count II of the complaint. The claims set out in paragraph 27 and paragraph 28, subparagraphs i-m of Count I, and Counts III and IV remain.

/s/
WAYNE E. ALLEY
UNITED STATES DISTRICT JUDGE

No. 97-6366
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CEDRIC D. SIMMS,
Plaintiff-Appellant,

v.

STATE OF OKLAHOMA, etc.,
Defendant-Appellee

ORDER
Filed February 24, 1999

Before TACHA, BRISCOE, and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Opal A. Carter
Deputy Clerk

ADDITIONAL STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath

or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect the charge.

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-12(a). Regulations

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5.

EEOC CHARGE FILED OCTOBER 31, 1994

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form.

AGENCY	CHARGE NUMBER
☐ FEPA ☒ EEOC	311950136

Oklahoma Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. Cedric D. Simms	(405) 329-6836

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
1303-B 12TH AVE. NE, NORMAN, OK 73071		11/22/66

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
GRIFFIN MEMORIAL HOSPITAL	Cat A (15-100)	(405) 321-4880

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
900 E. MAIN, NORMAN, OK 73071		027

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☐ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

EARLIEST	*LATEST*
08/15/94	08/15/94

☐ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected.

III. I believe I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended.

EXHIBIT
D

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date 10-31-94 Cedric Simms
Charging Party *(Signature)*

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
Cedric Simms

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year) 10/31/94

000020

EEOC FORM 5 (Rev. 06/92)

BEST AVAILABLE COPY

EEOC CHARGE FILED JULY 15, 1996

CHA. OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement - ore completing this form.

AGENCY	CHARGE NUMBER
☐ FEPA ☒ EEOC	AMENDED 311950136

Oklahoma Human Rights Commission and EEOC
State or local Agency, if any

NAME (Indicate Mr., Ms., Mrs.)	HOME TELEPHONE (Include Area Code)
Mr. Cedric D. Simms	(405) 329-6836

STREET ADDRESS	CITY, STATE AND ZIP CODE	DATE OF BIRTH
1303-B 12TH AVE. NE,	Norman, OK 73071	11/22/66

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME *(If more than one list below.)*

NAME	NUMBER OF EMPLOYEES, MEMBERS	TELEPHONE (Include Area Code)
GRIFFIN MEMORIAL HOSP		(405) 321-4880

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY
900 E. MAIN,	Norman, OK 73071	027

NAME	TELEPHONE NUMBER (Include Area Code)

STREET ADDRESS	CITY, STATE AND ZIP CODE	COUNTY

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☒ RACE ☐ COLOR ☐ SEX ☐ RELIGION ☐ NATIONAL ORIGIN
☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE
EARLIEST 05/01/94 *LATEST* 09/22/95
☒ CONTINUING ACTION

THE PARTICULARS ARE *(If additional space is needed, attach extra sheet(s)):*

I.

Beginning in May of 1994 and continuing until the present, I have had my supervisory duties with held from my Fire and Safety Officer II position in direct violation of a court order entered in a previous EEOC charge. Effective August 15, 1994, I was denied promotion to the position of Fire and Safety Officer Supervisor.

II.

The reasons given for withholding of supervisory duties and other disciplinary actions, I believe were pretextural. No other reason has been given for the withholding of supervisory duties. Carol Kellison (Director Management Support Services) informed me by written notice that a better experienced candidate had been selected

EXHIBIT 5

III.

I believe that I have been discriminated against because of my race, Black, and retaliated against for filing previous charges, and for objecting to unlawful employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

This charge has been amended to include retaliation, and the continuing violation.

☐ I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or telephone number and cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Date Charging Party *(Signature)*

NOTARY - (When necessary for State and Local Requirements)

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
X Cedric Simms

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
15 July 1996 George R Garrett

EEOC FORM 5 (Rev. 06/92)

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